WINSTON & STRAWN LLP

BLOG

The SEC's Recent Crypto No-Action Letter: Nothing to Get Excited About

APRIL 5, 2019

By now, everyone in the crypto-sphere knows that, on April 3, William Hinman, the Director of Securities and Exchange Commission's (SEC) Division of Corporation Finance, and Valerie Szczepanik, the SEC's Senior Advisor for Digital Assets and Innovation, issued a statement and related "Framework for 'Investment Contract' Analysis of Digital Assets." The Crypto Law Corner is currently analyzing the statement and related framework and will provide its take on them in the very near future. At first glance, it appears that the framework contains nothing new, but merely summarizes and organizes in a single document various actions taken by the SEC, and various statements made by members of the SEC staff, relating to the status of digital or virtual assets as securities under the federal securities laws. There is nothing in the framework that remotely suggests that the SEC is retreating from its stance that it is necessary to apply the so-called *Howey* test (described in our January 17 blog) to a digital or virtual asset, on a case-by-case basis, to determine whether the asset is a security.

There has also been a great deal of hype about a "no action" letter issued on the same day to TurnKey Jet, Inc. (TKJ). In that "no action" letter, the staff of the SEC's Division of Corporation Finance gave assurance to TKJ that it would not recommend that the SEC take any enforcement action against TKJ if it should offer and sell certain utility tokens (Tokens) without registration of such offers and sales under the Securities Act of 1933 and the Securities Exchange Act of 1934.

As counsel to TKJ explained in its request letter for "no action" relief, TKJ, which provides interstate air charter services as a licensed United States air carrier and air taxi operator, proposed to launch a Token membership program (Program), and develop a token platform (Platform) to facilitate token sales for air charter services via a private blockchain network (Network). TKJ would manage the Program as program manager. Each user would access and use the Platform via an application (App) that would include a wallet (Wallet). There would be three types of users of the Platform, depending on their role in the delivery of air charter services. Some users, namely "Consumers," could buy Tokens to consume air charter services. Other users, called "Carriers," could deliver charter flights directly to Consumers via the Platform with their own fleet of planes. Finally, other users, called "Brokers," could participate in the Platform by brokering charter flights between Consumers and Carriers. Each type of user would have a distinct membership agreement and the users of all types would be considered "Members" of the Program. All Members would be required to pay membership subscription fees to take part in the Program and purchase Tokens. Consumers could be individuals or business entities. Consumers would buy Tokens from TKJ only at a price of one

dollar per Token throughout the life of the Program. A typical transaction would involve a Consumer redeeming bought Tokens for air charter services.

After discussing the SEC staff's response to TKJ counsel's request for "no action" relief, we will discuss why the hype surrounding this letter is overblown.

The SEC staff's "no action" position was based primarily on the following facts and circumstances:

- TKJ would not use any funds from Token sales to develop the Platform, Network, or App, and each of these would be fully developed and operational at the time any Tokens were sold
- The Tokens would be immediately usable for their intended functionality (purchasing air charter services) at the time they were sold
- TKJ would restrict transfers of Tokens to TKJ Wallets only, and not to wallets external to the Platform
- TKJ would sell Tokens at a price of one USD per Token throughout the life of the Program, and each Token would represent a TKJ obligation to supply air charter services at a value of one dollar per Token
- If TKJ should offer to repurchase Tokens, it would do so only at a discount to the face value of the Tokens (one dollar per Token) that the holder sought to resell to TKJ (unless a court within the United States ordered TKJ to liquidate the tokens)
- The Tokens would be marketed in a manner that emphasized their functionality, and not their potential to increase in value

That the Tokens are not "investment contracts," and therefore not securities," under the *Howey* test is a fair and reasonable conclusion under these facts and circumstances. But how does this "no action" letter "advance the ball" in any significant manner? If TKJ had, for example, implemented this program on a "paper" basis or otherwise without the use of blockchain technology (for example, by issuing coupon booklets to Consumers containing coupons (presumably in denominations larger than one dollar!)) to redeem for air transport services, would counsel have even felt the need to write to the SEC staff to request "no action" relief? Isn't it clear that the type of tokens involved in this case are "pure" functional utility tokens, simply beyond the reach of the federal securities laws?

Still, I suppose it is helpful that the SEC staff has laid out a set of facts that provides guidance to the issuers of "pure" utility tokens. It should be noted, however, that the fact that other utility tokens don't "duplicate" these facts does not necessarily mean that they are or are not "securities."
4 Min Read

Related Locations

Chicago

Related Topics

Crypto Asset

Related Capabilities

Private Investment Funds | Cryptocurrencies, Digital Assets & Blockchain Technology

Related Regions

North America

Related Professionals

Basil Godellas

This entry has been created for information and planning purposes. It is not intended to be, nor should it be substituted for, legal advice, which turns on specific facts.

© 2025 Winston & Strawn LLP.